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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/551,828	09/30/2005	Glen Croskey	19134	3992
23389	7590	12/04/2009	EXAMINER	
SCULLY SCOTT MURPHY & PRESSER, PC			GWARTNEY, ELIZABETH A	
400 GARDEN CITY PLAZA			ART UNIT	PAPER NUMBER
SUITE 300			1794	
GARDEN CITY, NY 11530			MAIL DATE	
			12/04/2009	
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			PAPER	

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

<b>Office Action Summary</b>	<b>Application No.</b> 10/551,828	<b>Applicant(s)</b> CROFSKEY ET AL.
	<b>Examiner</b> Elizabeth Gwartney	<b>Art Unit</b> 1794

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If no period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) Responsive to communication(s) filed on 28 July 2009.
- 2a) This action is FINAL.      2b) This action is non-final.
- 3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) Claim(s) 1-18 and 20-24 is/are pending in the application.
  - 4a) Of the above claim(s) 12-18 and 20-24 is/are withdrawn from consideration.
- 5) Claim(s) \_\_\_\_\_ is/are allowed.
- 6) Claim(s) 1-11 is/are rejected.
- 7) Claim(s) \_\_\_\_\_ is/are objected to.
- 8) Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) The specification is objected to by the Examiner.
- 10) The drawing(s) filed on \_\_\_\_\_ is/are: a) accepted or b) objected to by the Examiner.
 

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
  - a) All    b) Some \* c) None of:
    1. Certified copies of the priority documents have been received.
    2. Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
    3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- 1) Notice of References Cited (PTO-892)
- 2) Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) Information Disclosure Statement(s) (PTO/1648)  
Paper No(s)/Mail Date 20090928
- 4) Interview Summary (PTO-413)  
Paper No(s)/Mail Date. \_\_\_\_\_
- 5) Notice of Informal Patent Application
- 6) Other: \_\_\_\_\_

### **DETAILED ACTION**

1. The Amendment filed 07/28/2009 has been entered. Claims 12-18 and 20-24 have been withdrawn and Claims 19 and 25 have been cancelled. Claims 1-18 and 20-24 are currently pending.

#### ***Claim Rejections - 35 USC § 103***

2. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

3. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

4. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

5. Claim 1-7 and 10-11 are rejected under 35 U.S.C. 103(a) as being unpatentable over Cerdá et al. (US 5,514,666).

Regarding claims 1-4, Cerdá et al. disclose a protein powder composition comprising from about 30 to about 35 (w/w) % pectin having a degree of esterification  $\geq$  50% (high ester or high methoxyl (HM) pectin) with the balance comprising protein (C3/L6-8, 53-57)(i.e. about 42% pectin w/w of the protein content-wherein the composition comprises 30% w/w pectin and 70% w/w protein). The protein powder composition has a pH of less than 7 (Example 1).

While Cerdá et al disclose a composition comprising from about 30 to about 35 w/w % pectin, the reference does not explicitly disclose a composition comprising from about 3 to about 15% pectin (weight/weight of the protein content).

As stability and viscosity of the reconstituted protein powder composition are variables that can be modified, among others, by adjusting the amount of pectin, the precise pectin would have been considered a result effective variable by one of ordinary skill in the art at the time of the invention. As such, without showing unexpected results, the claimed pectin content cannot be considered critical. Accordingly, one of ordinary skill in the art at the time the invention was made would have optimized, by routine experimentation, the pectin content of the protein powder in Cerdá et al. to obtain the desired balance between the viscosity and stability of the reconstituted protein powder composition (*In re Boesch*, 617 F.2d. 272, 205 USPQ 215 (CCPA 1980)), since it has been held that where the general conditions of the claim are disclosed in the prior art, discovering the optimum or workable ranges involves only routine skill in the art. (*In re Aller*, 105 USPQ 223).

Regarding the adsorption of the pectin to the protein base, as the Cerda et al. disclose the mixing of the pectin and the protein, it is considered intrinsic that the pectin would be adsorbed to the protein, as is claimed by Applicants.

Regarding claims 5-7, Cerda et al. disclose all of the claim limitations as set forth above. As the protein powder composition of the prior art meets the limitations of the protein powder composition of the instant claims it is considered to be intrinsic that the prior art composition would have provided the protein liquid with an increased stability as required. It is also considered to be inherent that the prior art composition would possess a viscosity as claimed.

The protein base of the protein powder composition may be milk (Example 2) The powder may be reconstituted in foodstuffs including salad dressings and juices (col. 3 lines 58-67).

6. Claims 8 and 9 under 35 U.S.C. 103(a) as being unpatentable over Cerda et al. (US 5,514,666) with evidence provided by May (May, C.D. 2000. Pectins. In Phillips, G.O.; Williams, P.A. Handbook of Hydrocolloids. pp. 169-188. Woodhead Publishing).

Regarding claims 8 and 9, Cerda et al. disclose all of the claim limitations as set forth above. Cerda et al. do not speak to the specific degree of esterification of their pectin, other than it is a HM pectin (i.e. pectin with degree of esterification equal to or greater than 50%).

One of ordinary skill in the art at the time the invention was made would have been able to clearly envisage the use of a pectin have a degree of esterification of greater than 60 or 70 % where a HM pectin was taught by the prior art. Alternatively, one of ordinary skill would have found it obvious to select a HM pectin having a degree of esterification of greater than 60 or 70%. May teaches that commercial pectin commonly has a degree of esterification of around 67-

73% (p. 172), indicating that one of ordinary skill would have found it obvious to utilize a pectin having a degree of esterification common to commercial HM pectins. Undue experimentation would not have been required, and there would have been a reasonable expectation that the resultant product would have maintained its physical and sensory properties.

*Response to Arguments*

7. Applicant's arguments with respect to claims 1-11 have been considered but are moot in view of the new ground(s) of rejection.

Applicants argue that the claims of the present invention, as amended, are not anticipated by the disclosure of Cerdá et al. since the reference does not disclose the presently claimed protein powder composition comprising from about 3 to about 15% pectin (weight/weight of the protein content) and the pectin having a degree of esterification  $\geq 50\%$ .

In this case, since the instant specification is silent with respect to unexpected results or the criticality to the upper range of the pectin composition, the specific pectin composition of the protein powder composition is not considered to confer patentability to the claims.

*Conclusion*

8. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO

MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth Gwartney whose telephone number is (571) 270-3874. The examiner can normally be reached on Monday - Friday; 7:30AM - 3:30PM EST..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Keith Hendricks can be reached on (571) 272-1401. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/E. G./  
Examiner, Art Unit 1794

/Keith D. Hendricks/  
Supervisory Patent Examiner, Art Unit 1794